~~PUBLIC~~

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	
BENCO DENTAL SUPPLY CO., a corporation,	
HENRY SCHEIN, INC., a corporation, and	**DOCKET NO. 9379**
PATTERSON COMPANIES, INC., a corporation.	**PUBLIC**

RESPONDENT PATTERSON'S MOTION [AND PROPOSED ORDER] TO DISMISS THE CASE AGAINST PATTERSON IN ITS ENTIRETY

Pursuant to Rule 3.22 of the Federal Trade Commission's Rules of Practice, Respondent Patterson Companies, Inc. ("Patterson") respectfully moves to dismiss the Complaint against Patterson in this action. For the reasons set forth in the accompanying memorandum, this motion should be granted.

Dated: December 20, 2018

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ATTORNEYS FOR
PATTERSON COMPANIES, INC.

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RESPONDENT PATTERSON'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS THE CASE AGAINST PATTERSON IN ITS ENTIRETY

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INTRODUCTION

Complaint Counsel alleges that Patterson joined the alleged Benco-Schein conspiracy to boycott, or refuse to discount to, "buying groups" in February 2013 until the conspiracy ended in April 2015.[1] But the evidence at trial showed nothing of the sort. Instead, enough evidence to "fill the Marianas Trench"[2] showed that Patterson acted independently and pro-competitively thousands of times right smack during the alleged conspiracy period: thousands of documented price concessions to win private practice dentists, including members of "buying groups," from Schein and Benco; millions of dollars invested to successfully invade Schein's DSO stronghold; and numerous "buying groups" met with, independently evaluated, and, when it occasionally made sense, sold to (like OrthoSynetics and Jackson Health).[3]

Every single witness denied under oath that Patterson entered into a "conscious *commitment* to a common *scheme* designed to achieve an unlawful end."[4] Complaint Counsel therefore cannot prevail unless the Court finds based on the documents that all these witnesses lied. But Complaint Counsel did not introduce any exhibit or testimony suggesting anyone from Patterson ever communicated with anyone from Schein about buying groups.[5] The entire case

[1] CC's Opening Slides 18-19 (conspiracy began February 2013); Trial Transcript VOL 1, 54:14–21 (conspiracy ended April 2015).

[2] Trial Transcript VOL 6, 1473:18–19; 1484:5–6.

[3] Trial Transcript Rough VOL 16 (Foley), 115:11–116:17 (describing OrthoSynetics); RX0271 (Jackson Health); RX0333 (considering whether Patterson's "historical" feelings towards "buying groups" might need to be revised for OrthoSynetics); *see also* CX0149 (industry publication describing Smile Source as "[a] lot like OrthoSynetics").

[4] *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984) (emphasis added); Trial Transcript Rough VOL 16, 240:4–5 (Ms. Kahn: "Your Honor, the law requires evidence of a conscious commitment to a common scheme.").

[5] The one communication Complaint Counsel identified between Patterson and Schein did not concern whether to sell or discount to buying groups, it concerned only whether to attend a trade show where the host was openly competing with and criticizing distributors like Patterson and

against Patterson hinges on *two* interfirm communications with Benco, one in February 2013 and one in June 2013.

On February 8, 2013, Patterson Dental's President, Paul Guggenheim, received an unsolicited, out-of-the-blue email from Benco's President Chuck Cohen about "some noise" he had picked up from public information that a fledgling entity called the New Mexico Dental Cooperative would be hosting a meeting in Patterson's Albuquerque office.[6] Cohen volunteered in the email that Benco had a long-standing, widely known policy of not selling to "buying groups."[7] Cohen confirmed under oath what the email shows on its face: he did not ask Patterson to do anything or expect a response at all.[8] Guggenheim, likewise, testified that he did not view the email as a request to commit to anything and he never made any commitment to refuse to sell or discount to "buying groups."[9] He testified that he dashed off a "ten-second response," simply saying "we feel the same way about these."[10] The word "feel" was not intended to suggest a commitment to do anything. [11]

Schein. *See* CC's Pre-Trial Br. at 32–34 (citing CX0112, CX1062, and CX3332). And Complaint Counsel are "not alleg[ing] a group boycott of the trade show. Trial Transcript VOL 1, 52:6–7.

[6] Trial Transcript VOL 7 (Guggenheim), 1699:9–22; CX0090.

[7] Trial Transcript VOL 3 (Cohen), 679:15–16 ("a policy that's been in place since 1996").

[8] Trial Transcript VOL 4 (Cohen), 707:5–7; 713:7–9; *see also* CX0057-006 ("I don't expect to hear anything.").

[9] Trial Transcript VOL 7 (Guggenheim) 1705:12–1707:8 ("Q. Did you commit in any way to Mr. Cohen in this e-mail that Patterson was not going to discount to buying groups? A. Absolutely not. Q. Did you commit in any way to do anything going forward with regard to buying groups? A. Never.").

[10] *Id.*

[11] *Id.* Guggenheim did forward Cohen's email—but not Guggenheim's response—to David Misiak and Tim Rogan, but did not ask them to do anything, and they testified they did not do

And, in fact, Patterson did not do anything in response to Cohen's email. Guggenheim did not "investigate" the New Mexico Dental Cooperative.[12] Patterson had already backed off its potential arrangement with the New Mexico Dental Cooperative by the day before Guggenheim got Cohen's email, because the group had sent a confusing, industry-wide email that was creating confusion with Patterson's long-time equipment vendors.[13] And Complaint Counsel produced no evidence that Guggenheim, or anyone at Patterson's Minnesota headquarters, sent an instruction to the New Mexico sales team over the weekend between Cohen's email and the local team's final decision to break things off with the New Mexico Dental Cooperative. Complaint Counsel's expert, Dr. Marshall, presumed from Guggenheim's email "that he's going to have a follow-up with people in his organization."[14] But Marshall could not "put [his] finger on such a communication."[15] Because none exists.

This, seemingly, is the "tragedy" Dr. Marshall warned of in his 2012 book, where he decried firms that are penalized for collusion based on one-hour lunch meetings.[16] Actual collusion, Dr. Marshall testified and previously wrote, "requires planning, investment in

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anything. Trial Transcript VOL 7 (Guggenheim), 1607:11–21; CX0316 (Misiak I.H. 235:8–12); Trial Transcript VOL 13 (Rogan), 3576:6–3577:21.

[12] Trial Transcript VOL 7 (Guggenheim), 1703:24–1704:2 ("Q. . . . [S]o you said to Mr. Cohen, I'll investigate it, but do I have it right that you did not do an investigation? A. Correct.").

[13] CX4090 (February 7, 2013: "The email you sent out has greatly confused the dental community, and actually Patterson's role in the dental business community as well. Dan Reinhardt, my regional manager and myself, have been getting calls with questions because manufacturers are confused as to the purpose of the meeting you called.").

[14] Trial Transcript VOL 12 (Marshall), 3310:20–24.

[15] Trial Transcript VOL 12 (Marshall), 3311:16–22.

[16] Trial Transcript VOL 12 (Marshall), 3327:9–19.

administration, clear thinking, and hard work."[17] Complaint Counsel put on zero evidence of Patterson doing any of that. Guggenheim's fleeting response to Cohen's surprise email is the opposite of "planning, investment in administration, clear thinking, and hard work." If collusion should not be presumed from one-hour lunch meetings, it should not be presumed from "ten-second" responses to unsolicited emails either.

Complaint Counsel's only other interfirm communication is a June 2013 email exchange, also between Cohen and Guggenheim, which it believes was Guggenheim monitoring and enforcing the alleged agreement.[18] But Guggenheim and Cohen denied that.[19] And nowhere, not even in "lemon juice," did the email say anything about a prior agreement or enforcement, nor is there any evidence Patterson could have enforced an agreement had there been one. The email instead shows Cohen and Guggenheim had *different* views about whether Atlantic Dental Care ("ADC") was a "buying group" or a DSO. The undisputed facts also show that each Respondent behaved differently with respect to ADC. Patterson decided not to bid on ADC in February 2013, Benco and Schein decided to bid, and by May 2013, Benco won.[20] *Then*, three weeks later, in *June* 2013, Guggenheim sent his email to Cohen asking about ADC.[21]

[17] Trial Transcript VOL 12 (Marshall), 3328:19–22.

[18] CX0062.

[19] Trial Transcript VOL 8 (Guggenheim), 1872:1–8; Trial Transcript VOL 4 (Cohen), 917:19–919:10.

[20] *See* CX0092 (February 27, 2018 email from Patterson's Misiak to Guggenheim discussing "stay[ing] out of" the Atlantic Dental Care RPF process); CX2021 (April 29, 2013 Schein bid for ADC business); CX0094 (May 31, 2013 email from Nease to Guggenheim: "Just a heads up on a situation in Chesapeake, VA, Benco recently responded to and won a bid proposal with a buying group called Atlantic Dental Care.").

[21] CX0062.

Because neither of Patterson's two buying-group-related communications with Benco even references a concerted action Patterson was to take with Benco or Schein towards buying groups, none of them are "direct evidence" as that term is understood in this or any court. Thus, Complaint Counsel must make a circumstantial case of parallel conduct supplemented by plus factors. But instead of parallel conduct, Complaint Counsel's evidence showed Patterson making its own decisions for each "buying group" identified, and those decisions were rational and prudent. It showed that the groups approaching Patterson often made "outlandish," "incoherent," or downright false claims—circumstances under which, Dr. Marshall conceded, it would not make sense to do business.[22]

Patterson's responses towards these groups were legitimate and, often, non-parallel. Complaint Counsel's own evidence showed that, while Patterson was not alone in being lied to by the Kois Buyers Group's representative, Qadeer Ahmed, Patterson's response to Ahmed was different from Benco's and Schein's.[23] It also shows that, whereas Benco never bid on Smile Source, Patterson and Schein both met with Smile Source, but Patterson waited until 2017 to submit a bid whereas Schein made a proposal in 2014—in the middle of a supposed conspiracy not to work with groups like Smile Source.[24] Indeed, Smile Source's Chief Dental Officer

[22] *See, e.g.*, Trial Transcript VOL 12 (Marshall), 3259:4–8 ("[I]f a distributor is talking to someone who they think is interacting with them in an irrational or irresponsible way, it would make sense not to do business with such a person."); *Id.* at 3259:12–16 ("If there was, however, some kind of incoherent management at one of these firms, I could understand them turning away that business, that that would not be irrational to me."); Trial Transcript VOL 10 (McFadden), 2706:2–8, 2806:2–20, 2810:7–13, 2814:7–9, 2817:6–11, 2819:22–24, 2820:21–2821:1, 2823:18–20, 2835:1–7; Trial Transcript VOL 13 (Rogan), 3631:25–3632:6, 3641:12–16.

[23] *See infra* 17.

[24] *See infra* 18.

testified that it received "three different responses" from the three Respondents in this case.[25] Finally, Patterson's alleged parallel conduct in rejecting the Georgia Dental Association happened in *September 2015*, five months *after* Complaint Counsel now says the alleged conspiracy ended.[26] That's it for alleged "parallel" conduct.

Complaint Counsel also did not support its "plus factors." Complaint Counsel produced no evidence of Patterson changing its practices before, during, or after the alleged February 2013–April 2015 conspiracy period. Its pre-conspiracy change-in-conduct evidence consists of a misquotation of Paul Guggenheim's deposition testimony, plus Patterson's decision not to partner with the New Mexico Dental Co-op—a decision that, the evidence showed, was made at the local level before Patterson could have joined a conspiracy. Complaint Counsel's during-conspiracy change-in-conduct evidence fell flatter, as the evidence showed that instead of "ultimately compet[ing] for ADC's business despite previously notifying ADC that it would not submit a bid," Compl. ¶ 50, Patterson never bid for ADC in 2013. Finally, Complaint Counsel's after-conspiracy evidence showed Patterson was still rejecting most "buying groups" long after April 2015 for the same rational business reasons it always had.

Finally, Complaint Counsel offered no evidence that the conspiracy it believes happened could possibly recur, as needed to justify injunctive relief.

* * *

We appreciate that dismissals under Rule 3.22(a) are rare. But the rule exists for a reason. Parties should not bear the continued expense and business distraction of defending themselves in post-hearing briefing and argument against claims revealed at trial to be untenable. This is the rare case where justice demands a dismissal.

[25] Trial Transcript VOL 8 (Goldsmith), 2175:18–2177:4.

[26] *See infra* 19.

STANDARD OF LAW

A motion to dismiss at the close of Complaint Counsel's case in chief must be granted if the record fails to establish a prima facie case in support of the Complaint.[27] Though the evidence must be viewed in the light most favorable to the complaint, only reasonable inferences can be drawn from that evidence.[28] Complaint Counsel must establish a prima facie case that the *individual movant, specifically*, participated in a conspiracy to survive a motion to dismiss.[29] To state a prima facie case against Patterson, Complaint Counsel is required to prove: "(1) the existence of an agreement, combination or conspiracy, (2) among actual competitors (i.e., at the same level of distribution), (3) with the purpose or effect of 'raising, depressing, fixing, pegging, or stabilizing the price of a commodity,' (4) in interstate or foreign commerce."[30] This motion focuses on the first element—the existence of an agreement—for which Complaint Counsel has made no prima facie case.

[27] *In the Matter of Uarco, Inc.*, 1964 WL 72888 at *11 (F.T.C. 1964) (Commission decision affirming ALJ's dismissal of complaint for failure to establish a prima facie case).

[28] *Id.*

[29] *United States v. Gypsum Co.*, 438 U.S. 422, 463 (1978) ("Liability [can] only be predicated on the knowing involvement of each defendant, considered individually, in the conspiracy charged."); *see also Kleen Products LLC v. Int'l Paper*, 276 F. Supp. 3d 811, 821 (N.D. Ill. 2017), *aff'd sub nom. Kleen Products LLC v. Georgia-Pac. LLC*, No. 17-2808, 2018 WL 6423941 (7th Cir. Dec. 7, 2018).

[30] *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1361 (10th Cir. 1989) (citations omitted); *see In re McWane, Inc.*, FTC Dkt No. 9351, at 235–36, 2013 FTC LEXIS 76, at *254 (May 8, 2013) (Initial Decision). An agreement under FTC Act Section 5 requires the same proof as an agreement under Sherman Act Section 1. *See, e.g., California Dental Ass'n v. FTC*, 526 U.S. 756, 762 & n.3 (1999) (explaining that Section 5 of the FTC Act "overlaps the scope of § 1 of the Sherman Act"); *FTC v. Cement Institute*, 333 U.S. 683, 691–92 (1948).

ARGUMENT

Trial has revealed a series of holes in Complaint Counsel's evidence, each of which precludes it from establishing a prima facie case that Patterson agreed with Schein and Benco not to work with dental "buying groups." To make out a prima facie case of an agreement under Section 5 of the FTC Act, Complaint Counsel had to produce either (1) direct evidence of the agreement or (2) evidence of parallel conduct along with certain plus factors indicative of an agreement.[31] Complaint Counsel did neither. It produced no written agreement or documented references to an agreement—nothing approaching "direct evidence." It failed to show that Patterson acted in parallel with Schein and Benco. And it failed to deliver on every plus factor. There is no prima facie case against Patterson, and dismissal is appropriate.

I. Complaint Counsel Produced No Direct Evidence Of An Agreement.

There is no direct evidence of Patterson participating in a conspiracy not to work with buying groups. "Direct evidence is evidence that is explicit and requires no inferences to establish the proposition being asserted."[32] "Put differently, direct evidence of conspiracy, if credited, removes any ambiguities that might otherwise exist with respect to whether the parallel conduct in question is the result of independent or concerted action."[33] Direct evidence could therefore include a written agreement, a recorded oral agreement, documented references to an

[31] *See In re Baby Food Antitrust Litig.*, 166 F.3d 112, 121–22 (3d Cir. 1999).

[32] *In the Matter of Benco Dental Supply Co., A Corp., Henry Schein, Inc., A Corp., & Patterson Companies, Inc., A Corp., Respondents.*, No. 9379, 2018 WL 6338485, at *6 (MSNET Nov. 26, 2018); *see also Baby Food*, 166 F.3d at 118, 121 (stating the same and ruling that plaintiffs did not make out a case of direct evidence when evidence required the court to draw on inferences and showed only an exchange of information among defendants).

[33] *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 325 n.23 (3d Cir. 2010).

agreement, or an admission of the agreement's existence by a party to the agreement.[34] Regardless, direct evidence of an agreement must expressly reference "some form of concerted action" to be taken as part of a "conscious commitment to a common scheme."[35]

As explained below, Patterson's two *inter*firm communications with Benco reference no "concerted action" to be taken regarding "buying groups." Nor do its communications with Schein about attending a trade show, which do not even mention "buying groups." These communications are therefore not direct evidence of an agreement not to work with "buying groups." Patterson's handful of *intra*firm communications are also not direct evidence because each requires one or more inferences to be read the way Complaint Counsel reads them. Complaint Counsel has therefore failed to produce direct evidence of Patterson's participation in an alleged Benco-Schein agreement not to work with "buying groups."

a. The Three Interfirm Communications Involving Patterson Are Not Direct Evidence Because They Discuss No Concerted Action To Be Taken Towards "Buying Groups."

Feelings and commitments are different things, as Complaint Counsel's expert acknowledged during trial.[36] Only the latter can give rise to an agreement under Section 5 of the FTC Act. An agreement under Section 5 is a commitment to *do something*, to take "some form

[34] *See Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 226 (3d Cir. 2011) (document explicitly manifesting the existence of the agreement in question); *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013) (recorded phone call of agreement to fix prices); *Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 52 (3d Cir. 2007) (memorandum detailing discussions from a meeting of a group of alleged conspirators); *Anderson News, L.L.C. v. Am. Media, Inc.*, 899 F.3d 87, 103 (2d Cir. 2018) (admission by defendant) (internal citations omitted).

[35] *See In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 356–57 (3d Cir. 2004) (quoting *Alvord–Polk, Inc. v. Schumacher & Co.*, 37 F.3d 996, 999 & n.1 (3d Cir. 1994)); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984).

[36] Trial Transcript VOL 12 (Marshall), 3323:8–3324:8.

of *concerted action*."[37] Complaint Counsel lists three interfirm communications involving Patterson as "direct" evidence of its alleged agreement.[38] Complaint Counsel has also listed more than 60 interfirm communications as relating to the alleged conspiracy.[39] None of these documents discusses any concerted action to be taken regarding "buying groups," so none are direct evidence.

First, Complaint Counsel alleges that Patterson's Paul Guggenheim's February 8, 2013 response to an unsolicited email from Benco's Chuck Cohen "constitutes direct evidence of a meeting of the minds between Patterson and Benco."[40] Complaint Counsel even claims this exchange "specif[ies] the terms of the no-buying group agreement."[41] These claims misunderstand what "direct evidence" is. The only discussion of any action to be taken is Guggenheim's response of "I'll investigate," and the action is not "concerted" and does not reference "buying groups."[42] Thus, it is not direct evidence.

Second, Complaint Counsel alleges that a June 2013 email exchange between Patterson's Paul Guggenheim and Benco's Chuck Cohen "establishes a conscious commitment to a common scheme."[43] But as Complaint Counsel's expert, Dr. Marshall, conceded at trial, the email

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[37] *Flat Glass*, 385 F.3d at 356–57 (quotation omitted) (emphasis added); *see also* Black's Law Dictionary (10th Ed. 2014) (defining "concerted action" as "[a]n *action* that has been planned, arranged, and agreed on by parties acting together *to further* some scheme or cause, so that all involved are liable for the actions of one another") (emphasis added). The sharing of an *existing* policy also cannot support a price fixing conspiracy. *Blomkest*, 203 F.3d at 1033–34.

[38] CC Pre-Trial Br. at 22–23, 32–33.

[39] RX2958 (response to Interrogatory 7).

[40] CC's Pre-Trial Br. at 22 (citing CX0090).

[41] CC's Pre-Trial Br. at 22.

[42] *See Alvord-Polk*, 37 F.3d at 999.

[43] CC's Pre-Trial Br. at 23 (citing CX3301).

exchange contains no explicit reference to any past agreement to take any concerted action, nor does it contain any commitment to take any future concerted action.[44] Thus, it too is not direct evidence of the alleged agreement.

Third, though it produced no communications between Patterson and Schein discussing "buying groups," Complaint Counsel nonetheless alleges that a set of their communications about a state dental association are "direct evidence" of an agreement about "buying groups."[45] Specifically, Complaint Counsel points to communications about whether to attend a Texas Dental Association trade show after the TDA started competing with Respondents and criticized them in its advertising.[46] But Complaint Counsel are "not alleg[ing] a group boycott of the trade show."[47] And none of these communications mention "buying groups." Witnesses testified they had nothing to do with "buying groups."[48] Complaint Counsel's expert, Dr. Marshall, also did not identify the TDA or TDA Perks Supplies as a "buying group."[49] He also saw no direct evidence that the TDA or TDA Perks Supplies ever sought to work with Patterson.[50] Thus, the TDA communications require an inference to support Complaint Counsel's belief that they show an agreement to boycott "buying groups," so they are not direct evidence of the alleged agreement.

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[44] Trial Transcript VOL 12 (Marshall), 3308:4–8.

[45] CC's Pre-Trial Br. at 32–35.

[46] *See* CC's Pre-Trial Br. at 32–34 (citing CX0112, CX1062, and CX3332). Complaint Counsel also mentioned communications regarding the Arizona Dental Association in their brief but presented no evidence about it at trial. CC's Pre-Trial Br. at 32, 34, 35.

[47] Trial Transcript VOL 1, 52:6–7.

[48] Trial Transcript VOL 14 (Steck), 3380:10–13 ("Q. From your perspective, did the call with Mr. Misiak have anything to do with the general topic of buying groups? A. No.").

[49] Trial Transcript VOL 12 (Marshall), 3293:18–3294:1.

[50] Trial Transcript VOL 12 (Marshall), 3298:20–3299:11 ("I don't see anything direct on that.").

Finally, Complaint Counsel may still claim, as it did in sworn interrogatory responses, that about 60 interfirm text messages and communications "relate to the conspiracy."[51] Not one relates to the alleged conspiracy. Sports talk is the dominant theme, and references to "Manziel," "Vikes," and so forth are not code for "buying group conspiracy."[52] Nor are communications regarding trade groups to which Sullivan and Paul Guggenheim both belonged, particularly communications about the trade group's hurricane relief efforts, or about improving sexual harassment training.[53] Nor are condolences at the death of a Patterson employee.[54] Tim Sullivan was "shocked to see" these communications in a sworn interrogatory response, and the Court should be too.[55] They are direct evidence of the vapidity of the allegations against Patterson.

b. Internal Patterson Communications Are Also Not Direct Evidence Of The Alleged Agreement.

The internal Patterson communications cited as "direct evidence" of the alleged agreement are also not direct evidence.[56] None expressly references an agreement with Schein and Benco. Each requires one or more inferences to conclude that Patterson was a party to an agreement with Schein and Benco. The relevant witnesses also deny Complaint Counsel's interpretations of every one of them.

First, Complaint Counsel cites a February 27, 2013 internal email from David Misiak to Anthony Fruehauf, in which Misiak wrote "our 2 largest competitors stay out of these as well."[57]

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[51] RX2958 (response to Interrogatory 7).

[52] *See, e.g.*, Trial Transcript Rough VOL 15 (Sullivan), 148:4–22.

[53] *See* Trial Transcript VOL 15 Rough (Sullivan), 161:10–168:17.

[54] *See* Trial Transcript VOL 15 Rough (Sullivan), 151:25–152:23.

[55] Trial Transcript Rough VOL 15 (Sullivan), 155:1.

[56] CC's Pre-Trial Br. at 25–26.

[57] CC's Pre-Trial Br. at 25 (citing CX0093).

Complaint Counsel claims that "Misiak could not have spoken confidently of Schein and Benco's views regarding competing for buying groups absent knowledge of collusion."[58] But that is itself an inference, so this is not direct evidence.[59] Also, Misiak testified that his email was about competitive market information; there was no agreement.[60]

Second, Complaint Counsel quoted another February 27, 2013 email from Misiak to Guggenheim as stating: "I've coached [Regional Manager] on how to stay out of this [buying group] with grace. *I'm concerned that Schein and Benco sneak into these co-op bids and deny it. . . .*"[61] Complaint Counsel writes that this exhibit is "indicative of an agreement."[62] But to be "indicative" of an agreement means an inference is needed, thus this cannot be direct evidence.[63] Also, Misiak denied this email had anything to do with an agreement.[64]

Third, Complaint Counsel cited an August 2013 email in which Tim Rogan wrote "*We don't need GPO's in the dental business. Schein, Benco, Patterson have always said no.* I believe it is our duty to uphold this and protect this great industry."[65] But this email requires an inference that Schein, Benco, and Patterson "have always said no" because they have agreed

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[58] *Id.*

[59] Complaint Counsel's citation of *B&R Supermarket, Inc. v. Visa, Inc.*, Case No. C-16-01150, 2016 U.S. Dist. LEXIS 136204, at *19–20 (N.D. Cal. Sept. 30, 2016), as "finding defendants' statements constituted direct evidence of a conspiracy reasoning that the VP 'could not speak so confidently on behalf of *all* networks save and except for her knowledge of collusion,'" CC's Pre-Trial Br. at 25 n.146 (emphasis added by Complaint Counsel), misses the distinction between that case and this one: Misiak did not purport to speak "on behalf of" Benco and Schein.

[60] Trial Transcript VOL 6 (Misiak), 1364:4–6.

[61] CC's Pre-Trial Br. at 26 (citing CX0316) (emphasis added by Complaint Counsel).

[62] CC's Pre-Trial Br. at 26.

[63] *Baby Food*, 166 F.3d at 118 (direct evidence "is explicit and requires no inferences").

[64] Trial Transcript VOL 6 (Misiak), 1508:23–1509:6.

[65] CC's Pre-Trial Br. at 26 (citing CX0106) (emphasis added by Complaint Counsel).

with each other to do so, instead of doing so independently. Thus, it is not direct evidence. Also, Rogan denied there was an agreement.[66]

Fourth, Complaint Counsel cited a September 2013 email from Benco's Patrick Ryan to Benco's Chuck Cohen, "CHUCK – *maybe what you should do is make sure you tell Tim [Sullivan] and Paul [Guggenheim] to hold their positions as we are.*"[67] This requires an inference that Ryan actually knew Tim Sullivan and Paul Guggenheim's positions and knew they were due to an agreement, which Ryan denied.[68]

Fifth, one document does explicitly refer to a "signed" agreement: a text message in which Patterson's Neal McFadden brushed off a former employee pitching him for work by writing, "we've signed an agreement that we won't work with GPO's."[69] But it is uncontested by Complaint Counsel and McFadden that there was no signed agreement, so an inference is needed for this text to be evidence of an agreement.[70]

Sixth, Complaint Counsel cited a *May 2015* email by Benco's Patrick Ryan stating, "*The best part about calling these [buying groups] is I already KNOW that Patterson and Schein have said NO.*"[71] This is circumstantial evidence of the *absence* of an agreement, because Complaint Counsel contends the alleged agreement ended a month *before* this email.[72] Certainly, it is not

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[66] Trial Transcript VOL 13 (Rogan), 3573:25–3574:8.

[67] CC's Pre-Trial Br. at 26 (citing CX0023) (emphasis added by Complaint Counsel).

[68] Trial Transcript VOL 5 (Ryan), 1114:5–18.

[69] CX0164.

[70] Trial Transcript VOL 1, 48:15–16 (Kahn: "[W]e don't believe there was a signed agreement, . . ."); Trial Transcript VOL 10 (McFadden), 2738:7–12 ("We never had any agreement, any signed agreement, that we would not work with GPOs. It was always a business decision.").

[71] CC's Pre-Trial Br. at 27 (citing CX0012) (emphasis added by Complaint Counsel).

[72] *See infra* n.130.

direct evidence of an agreement because it requires inferences that (a) the conspiracy was still going a month after Complaint Counsel said it ended, and (b) Patrick Ryan knew Patterson and Benco's responses to Dentistry Unchained because both were parties to an agreement, which Ryan denied, testifying that the statement was a joke because Benco, being smaller, always gets pitched after Schein and Patterson.[73]

Seventh, Complaint Counsel cited a *July 2015* email from Benco's Patrick Ryan to a sales representative, which stated: "We don't allow [volume discount] pricing unless there is common ownership. *Neither Schein nor Patterson do either.*"[74] This requires an inference that Schein and Patterson have these policies because they are parties to an agreement. Thus, it is not direct evidence. It is instead circumstantial evidence of *no* agreement, because it post-dates the end of the alleged agreement by three months.[75]

Thus, because all these internal statements require one or more inferences, they are not direct evidence.[76]

II. Complaint Counsel's Circumstantial Case Is Unsupported.

Because Complaint Counsel lacks direct evidence, it must prove an agreement using circumstantial evidence. To do so, Complaint Counsel must present evidence of parallel conduct supplemented with plus factors.[77] But here, Complaint Counsel has failed to make a prima facie showing of either parallel conduct or plus factors, so there is no prima facie circumstantial case.

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[73] Trial Transcript VOL 5 (Ryan), 1124:23–1125:4.

[74] CC's Pre-Trial Br. at 27 (citing CX0011) (emphasis added by Complaint Counsel).

[75] *See infra* n.130.

[76] *Baby Food*, 166 F.3d at 118 (direct evidence "is explicit and requires no inferences).

[77] *See McWane*, 2013 FTC LEXIS, at *275–76; *see also Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1033 (8th Cir. 2000).

a. Complaint Counsel Has Failed to Prove Parallel Conduct During the Conspiracy Period.

Complaint Counsel's pre-trial brief points to three examples of what it terms "parallel conduct" and alleges that Patterson acted similarly to the other respondents regarding Kois, Smile Source, and the Georgia Dental Association.[78] But the trial evidence proved the three Respondents did not have parallel responses in any of the three examples. And even if Respondents acted "parallel" in the vague sense that they ultimately did not do business with the group (which is only relevant in one of the three cases), acting similar with respect to *only three* "buying groups" over more than two years no more proves parallelism than showing correct time twice a day proves a clock is working.

To establish parallel action, Complaint Counsel must show "proof that defendants took identical actions within a time period suggestive of prearrangement."[79] "Parallel pricefixing must be so unusual that in the absence of an advance agreement, no reasonable firm would have engaged in it."[80] Thus, "to survive a motion to dismiss, alleged parallel behavior must be the kind "that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties."[81] Parallel conduct is therefore proven not by anecdote but by evidence that the behavior is more than coincidence or the result of independent action.[82] Complaint Counsel's apparent examples of "parallel conduct" are not that kind of evidence.

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[78] CC's Pre-Trial Br. at 36–37.

[79] *Anderson News*, 899 F.3d at 104.

[80] *Baby Food*, 166 F.3d at 135; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 n.4 (2007).

[81] *Twombly*, 550 U.S. at 556 n.4 (quoting 6 Areeda & Hovenkamp ¶ 1425, at 167–185).

[82] *Id.*; *Anderson News*, 899 F.3d at 102.

Take, for example, Complaint Counsel's number-one victim, the one it kicked off this trial with, the Kois Buyers Group. Complaint Counsel wrote before trial, "For example, all three Respondents turned down the Kois Buyers Group."[83] But trial showed this was not so. Qadeer Ahmed, the Canadian with a Hotmail account entrusted with starting the Kois Buyers Group in late 2014, got different responses from all three Respondents.[84] Patterson decided to pass after its diligence revealed Ahmed was misrepresenting his business.[85] Benco reached out to Dr. John Kois about working with him but not Ahmed, and Dr. Kois forwarded Benco's email to Ahmed, who then turned down *Benco* (not the other way around).[86] Schein was also interested but turned off by Qadeer Ahmed's high-pressure, deceptive tactics.[87] Dr. Kois even testified that, when he selected Burkhart, he understood that Schein *was still interested* in partnering.[88] The only thing parallel about Respondents' interactions with Qadeer Ahmed is that he lied to all of them.[89] It is

[83] CC's Pre-Trial Br. at 37.

[84] Trial Transcript VOL 2 (Kois, Sr.), 250:15–18.

[85] *See infra* n.130.

[86] Trial Transcript VOL 2 (Kois, Sr.), 274:10–277:11; RX1039 (Email from Chuck Cohen to Dr. John Kois proposing working together without Ahmed); RX1042 (Email from Chuck Cohen to Qadeer Ahmed: "Ok, you have my attention."); Trial Transcript VOL 4 (Cohen), 794:13–19; Trial Transcript VOL 4 (Cohen), 796:13–20; RX1042 (Email from Qadeer Ahmed to Chuck Cohen: "Between my first note to you and your reply, we have introduced our plan and have received, or are about to receive, written offers from various parties"); *see also* Trial Transcript VOL 4 (Cohen), 796:21–797:15 (Cohen interpreted Ahmed's email as saying "we really don't need you" and to be "ending the conversation with Benco").

[87] CX4310 ("I appreciate the 'get r done' approach, but it's not a style/approach that I am comfortable working in. I can't get married with a 'no big deal, we can always divorce later' mentality. . . .").

[88] CX8007 (Kois Sr. Dep. 152:5–9).

[89] Patterson: *compare* CX0116-002 (listing, under the heading "Manufacturers Committed," four manufacturers that had committed to a pricing discount); RX0354 ("Begin pilot program with approximately 1,700 dentists . . . ."), *with* RX0336 (Kavo Kerr said it had "not heard of this group and have no record of offering them any pricing"), *and* CX0116 (Ivoclar said, "They don't know these people."), *and* RXD0223 (Ivoclar's Canadian Sales Manager "does not recognize

a strange world indeed where lawyers for the Federal Trade Commission align themselves with a proven liar over those who did not buy his act.

Respondents' conduct towards Smile Source also was not parallel, as Dr. Goldsmith confirmed at trial.[90] Benco rejected Smile Source in 2011—before the conspiracy began according to Complaint Counsel.[91] Patterson met with Smile Source at Patterson's headquarters in 2013.[92] After hearing Smile Source out, Patterson told Smile Source that it was currently not interested but that it would keep "the strategy and Smile Source on the 'idea board' and get back to [it] should things change."[93] Schein also met with Smile Source in 2013, and later invited Smile Source to a second, larger meeting at Schein's headquarters.[94] In 2014, Schein made a proposal to Smile Source.[95] Ultimately, Smile Source chose Darby over Schein.[96]

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this group's name at all."), *and* RXD0224 (Dentsply said, "I inquired with our director of marketing and they don't know anything about this.").

Benco: RX1042 (falsely claiming to have "written offers from various parties").

Schein: RX2602 (falsely claiming to have "offers on the table and paid members," and also claiming to be offering Schein "the same deal every other distributor has already offered in writing").

[90] Trial Transcript VOL 8 (Goldsmith), 2177:2–4 ("Q. So three different respondents, three different responses; correct? A. Yes.").

[91] CX0004.

[92] Trial Transcript VOL 8 (Goldsmith), 2175:10–14.

[93] Trial Transcript VOL 8 (Goldsmith), 2175:1–2176:12.

[94] Trial Transcript VOL 8 (Goldsmith), 2137:10–2139:22 (Schein's response to Smile Source was different than Patterson and Benco's responses.).

[95] RX2336.

[96] Trial Transcript VOL 8 (Goldsmith), 2161:18–2162:15.

Finally, Respondents' conduct with respect to the Georgia Dental Association, parallel or not, weighs *against* an allegation of a conspiracy.[97] Patterson and Benco both declined to work with the GDA in *September 2015, months after* the conspiracy ended.[98] Schein never formally rejected the GDA at all.[99]

These three anecdotes having failed, Complaint Counsel has not established parallel conduct, so its circumstantial case fails with or without plus factors.

b. Complaint Counsel Has Not Proven Its Asserted Plus Factors.

Even if Complaint Counsel put on a prima facie case of parallel conduct, it failed to establish the existence of plus factors.

i. Change In Conduct

Complaint Counsel has not produced evidence that Patterson changed its conduct because of the alleged conspiracy. For a change in conduct to support an inference of conspiracy, it must have been "radical" or "abrupt."[100] No such changes occurred here. Complaint Counsel's evidence showed that Patterson's conduct was consistent before and after the alleged conspiracy

[97] *See* CC's Pre-Trial Br. at 37.

[98] CX3031 ("After careful consideration Patterson Dental has made the decision not to respond to the RFP at this time."); CX1037 ("Benco will respectfully decline to respond."); *see infra* n.130.

[99] CX0320 (Capaldo I.H.) at 84:6–11 ("A. No. They actually never came out and said they didn't want to work with us. They just never did anything other than continue to lead us down the garden path, never actually say anything but, you know, keep saying that they were supportive of us.").

[100] *Toys "R" Us, Inc. v. F.T.C.*, 221 F.3d 928, 935 (7th Cir. 2000) (toy manufacturers' abrupt shift from dealing with warehouse clubs to refusing to work with them in conjunction with executive testimony about the refusal to work supported an inference of conspiracy); *see also In re Domestic Drywall Antitrust Litigation*, 163 F. Supp. 3d 175, 255–56 (E.D. Pa. 2016) (defendants' decision to eliminate job quotes when they were a common industry feature was a "radical" and "abrupt" change supporting an inference of conspiracy).

period, so this "plus factor" weighs against Complaint Counsel's case—making it a "minus factor."

A. Pre-Conspiracy Conduct

Complaint Counsel have pointed to two alleged changes in conduct that occurred when Patterson allegedly joined the Benco-Schein conspiracy on February 8, 2013. First, they have claimed that, prior to that date, Patterson was "still evaluating" "buying groups."[101] But this claim is based on misquoted testimony from Paul Guggenheim's investigational hearing transcript. Complaint Counsel writes, "At the time of Guggenheim and Cohen's email exchange regarding NMDC, Patterson was still evaluating the value of doing business with buying groups."[102] But Guggenheim's testimony was in the *present tense*—he was speaking as of *the date of his testimony*. What Guggenheim said was: "Well, we're still evaluating these things, you know, for the value to the business. So each one of these is unique and different. And so generally we're continuing to look at these things *since this point in time and going forward till today*."[103]

Guggenheim said nearly the same thing at trial. Asked whether Patterson would meet with "buying groups" during the alleged conspiracy period, he responded: "We would meet with folks. . . Our evaluations would be whether or not they controlled the purchasing that they were representing, so we would always keep an open mind and evaluate that and determine each of these on their face as to whether or not they made sense for the business."[104] Other Patterson witnesses also testified that Patterson evaluated "buying groups" but usually did not see them as

[101] CC Pre-Trial Br. at 48–49.

[102] *Id.* at 23.

[103] CX0314-063 (Guggenheim I.H. 246:12–18) (emphasis added).

[104] Trial Transcript VOL 7 (Guggenheim), 1795:9–17.

attractive customers. David Misiak testified that buying groups were not part of Patterson Dental's core strategy in 2009 or in 2012.[105] Tim Rogan testified that there was no discussion of pursuing buying group business in the fall of 2012 because it would have been "a distraction."[106] "[E]ven today," Rogan said, "it's not an opportunity" Patterson is pursuing.[107]

Patterson documents corroborate this testimony. They show Patterson's skepticism towards "buying groups" stretching back at least as far as 2009, when David Misiak told local sales managers that GPO relationships "ha[ve] not been a good fit or need for [Patterson's] dental business."[108] Patterson likewise chose not to bid on an entity in 2009 because "it's a GPO."[109] In March 2012, Neal McFadden forwarded Misiak an email from the Florida Dental Association seeking Patterson's interest in a "buying group" it was forming.[110] McFadden told Misiak that he was going to say "thanks but no thanks."[111] Misiak responded, "Your response is right."[112] This exchange is nearly identical to one Misiak had on February 27, 2013, except that the latter was sent during the alleged conspiracy and is therefore being held out as key inculpatory evidence of an instruction not to work with "buying groups," while the former is ignored.[113] Finally, in December 2013, Shelley Beckler, a Patterson territory representative discussing a "buying group" internally reported, "*In the past* we have **not** done business with

[105] Trial Transcript VOL 6 (Misiak), 1499:14–19 (2009); Trial Transcript VOL 6 (Misiak), 1493:16–19 (2012).

[106] Trial Transcript VOL 13 (Rogan), 3605:18–25.

[107] *Id.*

[108] CX3114.

[109] RX0401.

[110] CX0159.

[111] *Id*.

[112] *Id*.

[113] *Compare id. with* CX0093.

GPO's [sic] just because we don't have the resources or the systems to manage them properly."[114] CX3010 (bolding in original, italics added). These contemporaneous documents further refute Complaint Counsel's misread of Guggenheim's testimony.

Aside from their misquotation of Guggenheim, Complaint Counsel's one other alleged pre-conspiracy change in conduct is Patterson's alleged decision not to partner with a single entity: the New Mexico Dental Cooperative ("NMDC").[115] But NMDC did not even exist at the time Patterson decided not to work with it.[116] Nor did it consider itself a "buying group."[117] Nor did Complaint Counsel produce evidence that Patterson considered NMDC a buying group. Complaint Counsel never sought testimony from Patterson's sales people in New Mexico, Scott Belcheff and Dan Reinhardt, to get their thoughts, and Paul Guggenheim did not think it was one.[118]

Complaint Counsel also produced no evidence that anyone at Patterson's corporate office (in Minnesota) instructed anyone on Patterson's New Mexico sales team to shut down NMDC over the *weekend* between February 8 (the date of the Cohen/Guggenheim email) and February 11, 2013 (the date the sales team told NMDC it would not participate).[119] Complaint Counsel's

[114] CX3010 (bolding in original, italics added).

[115] CC Pre-Trial Br. at 48–49.

[116] Trial Transcript VOL 9 (Mason), 2368:17–24 ("Q. But back in January and February of 2013, there was no entity the New Mexico Dental Cooperative. A. That is correct. Q. There were no draft agreements of what the, quote, New Mexico Dental Cooperative would look like; correct? A. That is correct. We were in our research and development phase.").

[117] Trial Transcript VOL 9 (Mason), 2364:19–2365:1 (Mason testified that NMDC is a dental cooperative, not a buying group).

[118] CX0314-059 (Guggenheim I.H. 230:5–232:19).

[119] Trial Transcript VOL 9 (Mason), 2386:24–2387:20.

expert, Dr. Marshall, conceded at trial there was no evidence of such an instruction.[120] Brenton Mason of NMDC also testified that he had no reason to doubt that Patterson's decision had been made locally (i.e., by its sales team in New Mexico).[121] As the Court may recall, Mason sent an industry-wide email blast to dental manufacturers on February 4, 2013, regarding a partnership he thought NMDC was forming with Patterson.[122] This email "created quite a stir" and caused Patterson to walk back its arrangement with NMDC as of *February 7*—the day *before* Cohen emailed Guggenheim.[123] The trial record suggests that NMDC's Mason was correct—Patterson's decisions towards NMDC were made locally.

For all these reasons, Complaint Counsel produced no change in conduct evidence supporting Patterson's entry into a Benco-Schein conspiracy. Certainly, it did not produce evidence of a radical or abrupt change as this plus factor requires.[124]

B. During-Conspiracy Conduct

Complaint Counsel also failed to produce evidence supporting its claim that Patterson changed its conduct towards a specific, perceived "buying group" (Atlantic Dental Care, or "ADC") during the alleged conspiracy. Complaint Counsel alleges that, due to a June 2013 email between Paul Guggenheim and Chuck Cohen confirming that ADC was not a "buying group," Patterson "ultimately competed for ADC's business despite previously notifying ADC

[120] Trial Transcript VOL 12 (Marshall), 3321:25–3323:5.

[121] Trial Transcript VOL 9 (Mason), ("Q. You have no reason to doubt that this was Mr. Reinhardt's decision, do you? A. No, I don't.").

[122] RX2235-003.

[123] Trial Transcript VOL 9 (Mason), 2352:10–14; 2376:6–11; 2381:1–16; and 2385:10–2386:7.

[124] *Toys "R" Us*, 221 F.3d at 935.

that it would not submit a bid."[125] Complaint Counsel has yet to produce any evidence of this, because it did not happen.[126] This allegation is also nonsensical, as Benco *had already won* ADC's business by the time of Guggenheim and Cohen's email, so there was no business for Patterson to compete for by June 2013.[127]

C. Post-Conspiracy Conduct

Complaint Counsel's post-conspiracy change-of-conduct claim is a jumble. Complaint Counsel alleged during summary decision briefing that "*in 2016*, Patterson's stance changed; it *began* to pursue buying groups."[128] The Commission adopted this statement in its ruling, writing: "Specifically, Complaint Counsel state that in 2016, a year after the Commission began its investigation into the Respondents' alleged agreement and the Texas Attorney General settled related charges with Benco, Patterson's stance changed, and it began to pursue business from buying groups."[129] Yet, in its opening statement, Complaint Counsel claimed that the conspiracy

[125] Compl. ¶ 50.

[126] Complaint Counsel also alleges that the June 2013 email between Paul Guggenheim and Chuck Cohen was an unexplained example of Patterson "confront[ing] Benco on suspicions of cheating." CC's Pre-Trial Br. at 23. But Guggenheim testified that the June 2013 email was not related to any conspiracy. Trial Transcript VOL 7 (Guggenheim), 1696:11–24 ("Q. And that's it, you asked two questions; is that right? A. Right. Q. Did you tell him about your bid or not to bid or Atlantic Dental Care? A. I did not. Q. Did you commit to him about anything you and your company were going to do with regard to Atlantic Dental Care going forward? A. Never. Q. Did you commit to him anything you or Patterson Dental were going to do with regard to any buying group going forward? A. Absolutely not."). Guggenheim has repeatedly explained that he sent the email to gain business intelligence. CX0314 (Guggenheim I.H. 299:1–6, 300:16–303:9); *see* Trial Transcript VOL 7 (Guggenheim), 1697:4–6 (Q. After that, did you change the company's strategy? A. No.). Complaint Counsel's mere disbelief is not evidence. *Alvord-Polk*, 37 F.3d at 1014.

[127] *See* CX0094 (May 31, 2013 email from Devon Nease to Guggenheim: "Benco recently responded to and won a bid proposal with a buying group called Atlantic Dental Care.").

[128] CC Mot. for Sum. Decision Opp. at 12 (emphasis added).

[129] Commission Opinion at 13.

period ended *in April 2015*, when it became "impossible" to maintain due to Benco's Texas Attorney General settlement requirement to log communications with competitors.[130] Either these claims are simply inconsistent—raising judicial estoppel concerns—or Patterson's stance on "buying groups" did not change until at least eight months after the alleged conspiracy ended.[131]

The problems only begin there. Whether the alleged end of the conspiracy occurred in April 2015 or at the beginning of 2016, it pre-dated by *at least a year* Patterson's alleged change-in-conduct—its early *2017* bid for Smile Source.[132] That's not "abrupt" by any definition.[133] Nor is eventually doing business with a single entity a "radical" change; Patterson had been in discussions with Smile Source since 2013.[134] Also, Patterson's Tim Rogan testified

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[130] Asked by the Court, "Is there an end to that period," Complaint Counsel responded:

> Yes, Your Honor. We will show that in April of 2015 Benco entered into a settlement agreement with the Texas attorney general. And as part of that settlement agreement, Benco was required to log and produce any communications with competitors, communications that we will look at today and we will walk through. And because of that settlement, because they were required to produce and log those communications, the conspiracy was effectively difficult if not impossible to maintain. And *so past that point* and the evidence will show we'll walk through today respondents started dealing with buying groups after that point.

Trial Transcript VOL 1, 19:6–19 (emphasis added).

[131] Judicial estoppel is an equitable doctrine that "protect[s] the integrity of the judicial process" by "prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (citations omitted). It typically applies where (1) a party's current position is clearly inconsistent with a past one, (2) the party previously succeeded in persuading a court to adopt the past position, and (3) the party would gain an unfair advantage if not estopped. *Id.* at 750–51.

[132] CC Pre-Trial Br. at 50 (claiming this bid was Patterson's change in conduct); Trial Transcript VOL 13 (Rogan), 3538:8–3540:8 (Rogan testified that Patterson bid on Smile Source in early 2017.); CX7100-198 ¶ 459 (Marshall Report) (same).

[133] *See Toys "R" Us*, 221 F.3d at 935.

[134] Trial Transcript VOL 8 (Goldsmith), 2175:10–14.

that Patterson engaged with Smile Source because Smile Source, unlike other "buying groups," offered many services to independent dentists.[135] In other words, Patterson's engagement with Smile Source was not a change in Patterson's approach to "buying groups"; Smile Source was simply structured differently than other "buying groups."[136]

Complaint Counsel cited another, particularly absurd example of a supposed change in conduct: Patterson's eventual alleged bid on Dentistry Unchained.[137] "Alleged," that is, because it is not even in the record when and if Patterson ever bid on Dentistry Unchained. Nor is it in the record that Dentistry Unchained interacted with Patterson between February 2013 and April 2015. This is not surprising: Dentistry Unchained describes itself as having "started in April 2015."[138] Obviously, Patterson *potentially* bidding *at some point* on an entity that existed *at some point* is not plus factor evidence.

What is in the record, though, destroys the claim that Patterson radically or abruptly flung open its doors to "buying groups" in April 2015 or at the beginning of 2016. On *July* 29, 2015—several months after the conspiracy ended according to Complaint Counsel's opening statement to this Court, Patterson was approached by Dentistry Unchained and did not pursue the

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[135] Trial Transcript VOL 13 (Rogan), 3581:12–3586:15 ("[T]hey offer a lot of things that Patterson can offer, so if we offered them to the dentist, we wouldn't need Smile Source, but if Smile Source is already offering them and they already have the relationship with the client and we don't have to offer them, then our cost structure goes down and we are able to lower our price as well. So we could sell to them at a lower price and actually have the same amount of profit.").

[136] Trial Transcript VOL 13 (Rogan), 3587:19–3588:4 ("Q. [D]uring your entire tenure with the company, 25 years, can you think of any other buying group that's ever brought to your attention that had its own office, with a board room, and a management team, and somewhere in the range of a hundred employees, all working to provide services for their members? A. I do not. Q. Is that why you engaged with Smile Source and not other buying groups? A. Yes.").

[137] CC Mot. for Sum. Decision Opp. at 12.

[138] Trial Transcript VOL 12 (Marshall), 3273:15–3274:16; RXD0212.

opportunity, writing in an internal email that a "GPO arrangement" can be a "slippery slope."[139] Then, on January 26, *2016*, in an internal Patterson discussion of Dentistry Unchained, a Patterson territory manager wrote that he had met with a Dentistry Unchained representative, and that he had "again explained to her very nicely that *we are not going to participate in a GPO type program at this point.*"[140]

Similarly, in *May* 2015, Neal McFadden responded to an inquiry about special pricing for "buying groups" by writing: "We *currently* have little appetite to deal with buying groups as we feel they compete directly with the branches and reps."[141] About a year later, in March 2016, McFadden internally forwarded the Integrity Dental Buyers Group's bid request reminder, writing, "This is the Georgia dental Association GPO. FYI I believe we're gonna pass on this one."[142] Assuming Complaint Counsel stands by its claim that the conspiracy ended in April 2015, this evidence eviscerates its case.[143]

For all these reasons, this plus factor is not supported.

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[139] CX3006.

[140] CX0137.

[141] RX0451 (emphasis added).

[142] CX0133.

[143] Likewise, on *July* 13, 2015, Benco's Patrick Ryan reassured a Benco sales representative who feared losing a $1 million account to a "buying group," saying, "We don't allow [volume discount] pricing unless there is common ownership. Neither Schein *nor Patterson* do either." CC's Opp. at 7 (citing CX0011) (emphasis added). Apparently, Ryan was not aware the conspiracy had ended several months earlier. *See supra* n.130.

ii. Actions Against Self-Interest

Complaint Counsel offered no evidence that Patterson made an irrational choice, given the available information, not to work with any "buying group."[144] Although actions against a defendant's economic self-interest can constitute a plus factor, they are typically seen as "less important" because they largely "restate interdependence" in the context of an alleged price fixing conspiracy.[145] Thus, no inference of a conspiracy can be drawn when there is an independent business justification for the defendant's behavior.[146]

Take the Kois Buyers Group for example. As Dr. Marshall conceded at trial, Patterson's reasons for not working with Kois are exceedingly rational.[147] As the Court may recall, Dr. John Kois engaged Qadeer Ahmed, a Canadian national with a Hotmail account, after almost no diligence, entrusting Ahmed to start a "buying group" in late 2014.[148] At the time, the Kois Buyers Group did not exist.[149] Yet Ahmed came to Patterson claiming thousands of members and four established manufacturers were signed up and ready to work with his group.[150] Patterson, skeptical, did its diligence and learned that Ahmed's claims were false.[151] The

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[144] *See Flat Glass*, 385 F.3d at 360–61 ("Evidence that the defendant acted contrary to its interests means evidence of conduct that would be irrational assuming that the defendant operated in a competitive market.").

[145] *Id.* at 361.

[146] *Blomkest*, 203 F.3d at 1037.

[147] Trial Transcript VOL 12 (Marshall), 3258:23–3259:8.

[148]Trial Transcript VOL 1, 217:10–218:14; CX8007 (Kois Sr. Dep. 31:8–33:17); CX0116-002 (qadeerahmed@hotmail.com).

[149] CX8007 (Kois Sr. Dep. 37:24–38:2).

[150] CX0116-002 (listing, under the heading "Manufacturers Committed," four manufacturers that had committed to a pricing discount); RX0354 ("Begin pilot program with approximately 1,700 dentists . . . .").

[151] Trial Transcript VOL 13 (Rogan), 3639:25–3640:2 ("Q. So his representation that all four of them had committed was not true? A. Correct."), 3641:12–20 ("Q. Are you starting to get the

manufacturers had never heard of him.[152] And the number of members Ahmed claimed to have was outlandish.[153]

Complaint Counsel, tellingly, did not call Ahmed as a witness at trial or take his testimony beforehand, even though he is the only person from Kois who interacted with Patterson.[154] Based on Patterson's diligence (a total waste of time and resources if Patterson was bound by agreement to reject Kois), its choice to pass on the Kois "opportunity" was exceedingly rational. Complaint Counsel has not offered any contrary evidence—nothing showing that Patterson secretly thought it in its interest to do business with Kois but rejected it anyways. This is a big minus factor.

Complaint Counsel also alleges that Patterson's email to Benco about its "feelings" towards "buying groups" was against Patterson's self-interest because it shared "sensitive" business information."[155] But Complaint Counsel offered no evidence that Patterson's feelings were sensitive or proprietary, or that Patterson was or could have been harmed by sharing them. Thus, Complaint Counsel has again failed to support this plus factor.

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sense that maybe this qadeerahmed@hotmail.com was somewhat outlandish in his representation that he had gotten commitments from these manufacturers? A. Yes. Q. Kind of an incoherent proposal to come to a company cold and say you have commitments from manufacturers when it turns out you don't have them. A. Correct.").

[152] RX0336 (Kavo Kerr said it had "not heard of this group and have no record of offering them any pricing"); CX0116 (Ivoclar said, "They don't know these people."); RXD0223 (Ivoclar's Canadian Sales Manager "does not recognize this group's name at all."); RXD0224 (Dentsply said, "I inquired with our director of marketing and they don't know anything about this.").

[153] Trial Transcript VOL 13 (Rogan), 3646:7–3647:2 ("[T]he largest DSO in the country, in the United States right now is Heartland Dental, and they have 850 offices, and they're -- everybody knows who they are. So if somebody had 1200 offices, we would know who they are.").

[154] CX8007 (Kois Sr. Dep. 145:11–20).

[155] CC's Pre-Trial Br. at 45–46.

iii. Motive To Conspire

Evidence of a motive to conspire is a "background" plus factor that cannot establish a conspiracy on its own.[156] It is typically considered less important because it (along with actions against self-interest) "largely restate[s] the phenomenon of interdependence."[157] Thus, it is neither necessary nor sufficient to prove the existence of an agreement.[158]

Complaint Counsel's evidence consists of two SWOT ("Strengths, Weaknesses, Opportunities, Threats") PowerPoint slides from 2012 and 2014.[159] The "threat" listed on the 2012 slide, when viewed in context, was that Patterson would *miss out* on potential business opportunities with classes of potential customers including "national buying groups," "group practices," and "institutions."[160] Paul Guggenheim confirmed this interpretation at trial.[161] Likewise, the threat listed on the 2014 slide suggests the absence of an agreement, as it identifies as a "threat" "competitors' willingness" to work with "buying groups" during the time Patterson was supposed conspiring with those competitors not to work with "buying groups."[162]

Meanwhile, other contemporaneous documents show Patterson did not consider "buying groups" to be a serious threat. Neal McFadden and Anthony Fruehauf testified that "buying

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[156] *Blomkest*, 203 F.3d at 1043; *see also In the Matter of the N. Carolina Bd. of Dental Examiners*, 152 F.T.C. 75, 2011 WL 11798452, at *65 (July 14, 2011) ("The mere opportunity to conspire does not by itself support the inference that such an illegal combination actually occurred.").

[157] *Flat Glass*, 385 F.3d at 361.

[158] *Id.* at 361 n.12.

[159] CC's Pre-Trial Br. at 41–42 (citing CX3283 and CX3286).

[160] See CX3286-026 (listing as "external threats" "Expansion of national buying groups, group practices, institutions")

[161] Trial Transcript VOL 7 (Guggenheim), 1580:12–1581:14.

[162] *See* CX3283-010 ("Emergence of GPOs and our competitors [sic] willingness to negotiate with these groups.") (emphasis added).

groups" were not worth their time.[163] David Misiak wrote of "buying groups" in September 2013—right at the peak of the alleged conspiracy, "I *would not* currently classify these as a big *threat* to the business."[164] Thus, this plus factor is unsupported as well.

III. Complaint Counsel Has Failed To Show A Need For The Relief Requested In The Complaint.

Finally, the Complaint should be dismissed as moot because Complaint Counsel put on zero evidence of a need for the relief sought in the Complaint. Under Section 5 of the FTC Act, to be granted injunctive relief, Complaint Counsel must show that there is a cognizable danger, rather than a mere possibility, of recurrent violation.[165] The burden is on Complaint Counsel to show that an injunction is warranted.[166]

Here, Complaint Counsel is seeking a cease and desist order for conduct it admits ceased years ago, and Complaint Counsel has presented no evidence of a cognizable danger of recurrence.[167] There is also no dispute that Patterson is now pursuing "buying group" business

[163] McFadden testified that "we determined that buying groups, they don't have any influence or they cannot mandate their clients' purchase, there was not really any upside from a business perspective that we could see by pursuing buying groups." Trial Transcript VOL 10 2673:22–2674:2. Fruehauf said in his deposition that "buying groups" were a "small part" of his region and that offering an extra discount to the few Patterson customers participating in buying groups would risk angering Patterson's other, better customers. CX8013 (Fruehauf Dep. 58:15–59:17).

[164] CX0145 (emphasis added).

[165] *TRW, Inc. v. F.T.C.*, 647 F.2d 942, 954 (9th Cir. 1981) (setting aside Commission order when the company was no longer infringing at the time of the Commission's order and complaint counsel failed to prove a "cognizable danger of recurrent violation"); *see also Borg-Warner Corp. v. F.T.C.*, 746 F.2d 108, 110 (2d Cir. 1984) (reversing Commission order when the alleged infringing conduct had terminated before the order was issued and nothing in the record suggested a possibility of recurrence).

[166] *Borg-Warner* at 110.

[167] *See* Trial Transcript VOL 1, 19:6–19; *see also* Compl. at 15.

and working with several "buying groups."[168] Because Complaint Counsel claims that Patterson's alleged infringing conduct has ceased and Complaint Counsel has presented no evidence of a cognizable danger of recurrence, this matter is moot and there is no basis for the relief requested.

CONCLUSION

Complaint Counsel did not provide proof of Counts I, II, and III sufficient to make a prima facie case against Patterson. Moreover, Complaint Counsel has failed to show a need for the relief requested in the Complaint. The Complaint against Patterson must therefore be dismissed.

Dated: December 20, 2018

/s/ Joseph A. Ostoyich

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[168] Trial Transcript VOL 1, 19:19–22 (Kahn: "the evidence will show that . . . respondents started dealing with buying groups after [April 2015]"); Trial Transcript VOL 10 (McFadden), 2733:22–2735:1 (Patterson bid on Smile Source's business in 2016 but lost to Schein); CX8028 (Lepley Dep. 37:3–39:12) (Patterson entered into contracts with two buying groups, Dr. Levin and Lake Harbor, in May 2018); Trial Transcript VOL 10 (Meadows), 2652:22–2653:2 (Schein currently works with Smile Source).

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ATTORNEYS FOR
PATTERSON COMPANIES, INC.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
BENCO DENTAL SUPPLY CO., a corporation,	)	
HENRY SCHEIN, INC., a corporation, and	)	**DOCKET NO. 9379**
PATTERSON COMPANIES, INC., a corporation.	)	

[PROPOSED ORDER]

Having carefully considered Respondent's Motion, Complaint Counsel's Opposition, and Respondent's Reply, the record, and the applicable law, it is hereby ORDERED AND ADJUDGED, that Respondent's Motion to Dismiss to Dismiss the Case Against Patterson in its Entirety is hereby GRANTED, and this action is DISMISSED.

ORDERED:

_____
Judge D. Michael Chappell
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2018, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
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Washington, D.C. 20580

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I also hereby certify that on December 20, 2018, I delivered via electronic mail a copy of the foregoing public document to:

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December 20, 2018

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Attorney

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

December 20, 2018

By: /s/ *Andrew T. George*

Attorney